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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 42

FRED L. SHUTTLESWORTH,

Petitioner,

—v.—

CITY OF BIRMINGHAM, ALABAMA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

BRIEF FOR PETITIONER

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INDEX

PAGE

Opinions Below 1

Jurisdiction 2

Questions Presented 2

Constitutional and Statutory Provisions Involved 4

Statement

I. The Events of Good Friday, 1963, in Birmingham, Alabama 5

II. The Proceedings Below 11

Summary of Argument 20

ARGUMENT

I. Petitioner's Conviction Must Be Reversed Because Birmingham General City Code §1159 Was, as Written and in Force in 1963, a Facially Unconstitutional and Void Prior Restraint Upon Free Expression; and Petitioner Cannot Constitutionally Be Punished for Failing to Comply With Its Permit Requirement .. 26

II. Petitioner's Conviction Must Be Reversed Because It Imposes Criminal Liability Upon Him Without the Fair Notice Required by Due Process of Law 41

PAGE

III. Petitioner's Conviction Must Be Reversed Because §1159, as Construed by the Supreme Court of Alabama, Remains Unconstitutional for Want of Procedural Safeguards Adequate to Assure Against Censorial Abuse of the Licensing Scheme 44

CONCLUSION 50

TABLE OF CASES

Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 88 S. Ct. 1601 (1968) 31
Ashton v. Kentucky, 384 U. S. 195 (1966) 31

Baggett v. Bullitt, 377 U. S. 360 (1964) 30
Baker v. Bindner, 274 F. Supp. 658 (W. D. Ky. 1967) 35
Bantam Books, Inc. v. Sullivan, 372 U. S. 58 (1963) ..36, 45
Bouie v. City of Columbia, 378 U. S. 347 (1964) 42
Bridges v. Wixon, 326 U. S. 135 (1945) 21

Cantwell v. Connecticut, 310 U. S. 296 (1940) 26
Commercial Pictures Corp. v. Regents, 346 U. S. 587 (1954) 27
Cox v. Louisiana, 379 U. S. 536 (1965) 27, 31, 32
Cox v. Louisiana, 379 U. S. 559 (1965) 42
Cox v. New Hampshire, 312 U. S. 569 (1941) 3, 17, 22, 30, 31, 32

Davis v. Francois, —— F. 2d ——, 5th Cir., No. 25562, decided May 28, 1968 31
Dombrowski v. Pfister, 380 U. S. 479 (1965) 24, 31, 34, 36, 37

PAGE

Edwards v. South Carolina, 372 U. S. 229 (1963) ..19, 20, 31
Elfbrandt v. Russell, 384 U. S. 11 (1966) 31

Freedman v. Maryland, 380 U. S. 51 (1965) 29, 30, 34, 38, 40, 45, 48

Gamble v. City of Dublin, 375 F. 2d 1013 (5th Cir. 1967) 35
Gelling v. Texas, 343 U. S. 960 (1952) 27
Gober v. City of Birmingham, 373 U. S. 374 (1963) 5, 21
Guyot v. Pierce, 372 F. 2d 658 (5th Cir. 1967) 35

Hague v. C. I. O., 307 U. S. 496 (1939) 26, 31
Henry v. City of Rock Hill, 376 U. S. 776 (1964) 31
Holmby Productions, Inc. v. Vaughn, 350 U. S. 870 (1955) 27

In re Giles, 133 Ala. 211, 32 So. 167 (1902) 46
In re Shuttlesworth, 369 U. S. 35 (1962) 5, 21
Interstate Circuit, Inc. v. City of Dallas, 20 L. ed. 2d 225 (1968) 16, 23, 26, 31

James v. United States, 366 U. S. 213 (1961) 42
Johnson v. New Jersey, 384 U. S. 719 (1966) 42
Jones v. Opelika, 316 U. S. 584 (1942), vacated and previous dissenting opinions adopted *per curiam* 319 U. S. 103 (1943) 26-27, 29
Joseph Burstyn, Inc. v. Wilson, 343 U. S. 495 (1952) ..27, 31

Keyishian v. Board of Regents, 385 U. S. 589 (1967) ..31, 36
King v. City of Clarksdale, 186 So. 2d 228 (Miss. 1966) . 35
Kunz v. New York, 340 U. S. 290 (1951) 27, 31

PAGE

Lanzetta v. New Jersey, 306 U. S. 451 (1939) 41
Largent v. Texas, 318 U. S. 418 (1943) 26, 29, 33
Lassiter v. Werneth, 275 Ala. 555, 156 So. 2d 647 (1963) 47
Linkletter v. Walker, 381 U. S. 618 (1965) 42
Lovell v. Griffin, 303 U. S. 444 (1938) 23, 26, 28, 31, 32, 34, 38, 40

Marsh v. Alabama, 326 U. S. 501 (1946) 27

N.A.A.C.P. v. Button, 371 U. S. 415 (1963) 16, 23, 31, 34, 36
Niemotko v. Maryland, 340 U. S. 268 (1951) 27

O'Connor v. Ohio, 385 U. S. 92 (1966) 42

Payne v. Spragins, 207 Ala. 264, 92 So. 466 (1922) 46
Poulos v. New Hampshire, 345 U. S. 395 (1953) 32

Raley v. Ohio, 360 U. S. 423 (1959) 42
Rodgers v. Meredith, 274 Ala. 179, 146 So. 2d 308 (1962) 46

Saia v. New York, 334 U. S. 558 (1948) 27, 31
Schneider v. State, 308 U. S. 147 (1939) 26, 29, 31, 33, 40
Shirey v. City Board of Education, 266 Ala. 185, 94 So. 2d 758 (1957) 47
Shuttlesworth v. City of Birmingham, 373 U. S. 262 (1963) 5, 21
Shuttlesworth v. City of Birmingham, 376 U. S. 339 (1964) 5, 21
Shuttlesworth v. City of Birmingham, 382 U. S. 87 (1965) 5, 21, 27, 32

PAGE

State ex rel. Ducourneau v. Langan, 149 Ala. 647, 43 So. 187 (1907) 47

Staub v. Baxley, 355 U. S. 313 (1958) 23, 27, 29, 32, 34, 38, 40

Superior Films, Inc. v. Department of Education, 346 U. S. 587 (1954) 27

Teitel Film Corp. v. Cusack, 390 U. S. 139 (1968) ..25, 45, 48, 50

Tucker v. Texas, 326 U. S. 517 (1946) 27

Walker v. City of Birmingham, 388 U. S. 307 (1967) ..5, 19, 20, 21, 36

Yick Wo v. Hopkins, 118 U. S. 356 (1886) 48

Zwickler v. Koota, 389 U. S. 241 (1967) 37

OTHER AUTHORITIES

Ala. Code Ann., Tit. 7, §248 (Recomp. vol. 1960) 47

Ala. Code Ann., Title 7, §1074 (Recomp. vol. 1960) ... 46

General City Code of Birmingham, §1159 .....*Passim*

United States Commission on Civil Rights, 1963 Report 39

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BRIEF FOR PETITIONER

Opinions Below

The opinion of the Supreme Court of Alabama (A. 163-176) is reported at 206 So. 2d 348 (1967). The opinions of the Court of Appeals of Alabama, Sixth Division (A. 88-154), are reported at 43 Ala. App. 68, 180 So. 2d 114 (1965). The Judgment of the Circuit Court for the Tenth Judicial Circuit of Alabama, convicting petitioner Shuttlesworth and sentencing him to 90 days at hard labor, and to an additional 48 days at hard labor in default of $75 fine and taxable costs of $24 (A. 6-8) is unreported.

Jurisdiction

The judgment of the Supreme Court of Alabama was entered November 9, 1967 (A. 177-178). On January 27, 1968, Mr. Justice Black extended petitioner's time for filing his petition for a writ of certiorari to and including March 8, 1968. The petition was filed March 7, 1968 and granted April 22, 1968. Jurisdiction of this Court rests on 28 U. S. C. §1257(3) (1964), petitioner having asserted below and asserting here the deprivation of rights, privileges and immunities secured by the Constitution of the United States.

Questions Presented

Petitioner Shuttlesworth participated, on Good Friday in 1963, in an orderly march of 52 civil rights demonstrators on the sidewalks of the City of Birmingham, Alabama. No permit was obtained for the march under Birmingham General City Code, §1159, pp. 4-5 *infra*, which forbids parades, processions or public demonstrations on the streets or public ways of the city without a permit issued by the City Commission, and which empowers the Commission to deny a permit if "in its judgment the public welfare, peace, safety, health, decency, good order, morals or convenience require that it be refused." Shuttlesworth was subsequently prosecuted and convicted for violation of §1159. The Court of Appeals of Alabama reversed his conviction, holding *inter alia* that the Good Friday march was not a parade or procession required to be licensed under §1159 and that the ordinance was federally unconstitutional as a regulation for the licensing of First Amendment activity without appropriate narrow standards to govern the licenser's discretion. The Supreme Court of Alabama

reversed, construing §1159—for the first time, four and a half years after the events of 1963—in a fashion which excised the grants of discretion conveyed by such terms as "peace," "decency," "good order," and "morals," and which purported to conform the standards for administration of permits under §1159 to those upheld by this Court in *Cox* v. *New Hampshire*, 312 U. S. 569 (1941). It held that petitioner had violated the ordinance so construed, that the ordinance so construed was constitutional, and that petitioner's conviction must be sustained. The questions presented here are:

1. Whether petitioner's conviction is forbidden by the First and Fourteenth Amendments, in that §1159, as it was written and in force in 1963, was facially unconstitutional, with the result that petitioner could not constitutionally be required to comply with its command that he obtain a permit under it for the exercise of his rights of free expression.

2. Whether petitioner's conviction is forbidden by the Fourteenth Amendment's requirement of fair notice of potential criminal liability, where petitioner's disregard of §1159 was squarely within the scope of conduct immunized from criminal prosecution by controlling constitutional decisions of this Court; and where, in addition, the applicability of §1159 to marches on the sidewalks of the City of Birmingham was announced for the first time by the Alabama Supreme Court in his case, four and a half years after the march.

3. Whether, as construed by the Supreme Court of Alabama, §1159 remains unconstitutional by force of the First and Fourteenth Amendments, that it ordains a scheme

of prior licensing of free speech activity, without adequate administrative and judicial procedures to safeguard against the dangers of censorial abuse.

Constitutional and Statutory Provisions Involved

This case involves the First Amendment and Section 1 of the Fourteenth Amendment to the Constitution of the United States.

It also involves the following ordinance of the City of Birmingham, Alabama:

GENERAL CODE OF THE CITY OF BIRMINGHAM, ALABAMA (1944), §1159

> It shall be unlawful to organize or hold, or to assist in organizing or holding, or to take part or participate in, any parade or procession or other public demonstration on the streets or other public ways of the city, unless a permit therefor has been secured from the commission.
>
> To secure such permit, written application shall be made to the commission, setting forth the probable number of persons, vehicles and animals which will be engaged in such parade, procession or other public demonstration, the purpose for which it is to be held or had, and the streets or public ways over, along or in which it is desired to have or hold such parade, procession or other public demonstration. The commission shall grant a written permit for such parade, procession or other public demonstration, prescribing the streets or other public ways which may be used therefor, unless in its judgment the public welfare,

peace, safety, health, decency, good order, morals or convenience require that it be refused. It shall be unlawful to use for such purposes any other streets or public ways than those set out in said permit.

The two preceding paragraphs, however, shall not apply to funeral processions.

Statement

I. The events of Good Friday, 1963, in Birmingham, Alabama.

Between 2:00 and 2:30 p.m. on Good Friday, April 12, 1963, police officers of the City of Birmingham, Alabama, took up surveillance outside a Negro church on the north side of Sixth Avenue North, between Fourteenth and Fifteenth Streets, in Birmingham (A. 18, 28, 36, 45, 53). A meeting was in progress in the church (A. 53). At 2:05 p.m. the petitioner, Reverend Fred L. Shuttlesworth, arrived in a car and entered the church (A. 46). Petitioner was well known to several of the Birmingham officers (A. 46, 57).[1]

In addition to the officers who were "detailed to the downtown area to work and watch for demonstrations that

[1] Petitioner Shuttlesworth is, of course, a " 'notorious' person in the field of civil rights in Birmingham," *Shuttlesworth* v. *City of Birmingham*, 382 U. S. 87, 102 (1965) (Mr. Justice Fortas, concurring). Toward such a notorious person, "[t]he attitude of the city administration in general and of its Police Commissioner in particular are a matter of public record, . . . and are familiar to this Court from previous litigation. See *Shuttlesworth* v. *City of Birmingham*, 382 U. S. 87 (1965); *Shuttlesworth* v. *City of Birmingham*, 376 U. S. 339 (1964); *Shuttlesworth* v. *City of Birmingham*, 373 U. S. 262 (1963); *Gober* v. *City of Birmingham*, 373 U. S. 374 (1963); *In re Shuttlesworth*, 369 U. S. 35 (1962)." *Walker* v. *City of Birmingham*, 388 U. S. 307, 325 n. 1 (1967) (Chief Justice Warren, dissenting).

was to take place that afternoon" (A. 45), there assembled in the vicinity of the church a considerable crowd of spectators (A. 44), including a number of photographers (A. 57). At about 2:30 p.m. (A. 46), the late Dr. Martin Luther King, Jr., Reverend Abernathy and petitioner Shuttlesworth led a group of Negro marchers from the church (A. 37, 73-74, 77). The group proceeded east along the north sidewalk of Sixth Avenue North for two and a half blocks to 17th Street, turned south for one block on Seventeenth Street to Fifth Avenue North, turned east again on Fifth Avenue North and proceeded for one-half block before they were confronted and surrounded by police and arrested (A. 37-38, 48, 53). In the middle of the 1700 block of Fifth Avenue, a motorcycle officer drove his motor up to the sidewalk, stationed himself in front of the oncoming marchers, hollered "Does anyone in this group have a permit?" and received no answer (A. 20-21, 25, 51). Other Birmingham police on motorcycles and in cars moved in, sealed the marchers off from the crowd of spectators, arrested the marchers, and loaded them into paddy wagons (A. 27, 51, 60-61). The officers had not asked where the marchers were going before they were arrested (A. 28).

The peaceful conduct of the marchers is not contested. Police and defense witnesses alike agreed that they were orderly (A. 43, 77). The marchers were in formation (A. 20, 23, 37, 47, 53, 54), just walking along (A. 25-26, 30, 43). One police witness said that they were singing, clapping hands and shouting (A. 50). Another said that they were singing when they left the church, but he did not recall whether they continued to sing along the route of march (A. 37, 43). Still another officer heard singing, but reported no clapping or shouting (A. 20, 24, 26). A fourth officer

agreed that there was singing, but could not tell whether it came from the marchers or the spectators (A. 59).

The total number of marchers was 52 (A. 43, 47, 68, 69, 71). They marched only on the sidewalk, except when they crossed streets at intersections (A. 20, 22, 24, 35, 38, 43, 47, 50, 52-53). The police variously testified that the marchers "were marching two abreast . . . approximately forty inches apart" (A. 39; *accord:* R. 41-43, 47, 49 (two officers)), that they were "about three or four wide" (A. 53) "and sometimes more" (A. 57), and that—at the final point where they were confronted and stopped by the police—they were "paired off in fours and sixes" (A. 24; see also A. 22). Defense witnesses testified uniformly that the group proceeded in twos (A. 66, 67, 69, 71, 74, 77), and one police officer who observed the marchers all the way from the church to the point of arrest (A. 40) expressly denied that they ever formed themselves into fours or sixes (A. 42). The officer who described the group as aligned in fours and sixes at the point of arrest also indicated that this formation extended "all the way across the sidewalk" (A. 22), but there was no testimony relating to the proportion of the sidewalk occupied by the marchers at earlier points of the march, and no evidence that at any point they inconvenienced other pedestrians or excluded them from the use of the sidewalk.

As the marchers went along, the crowd of spectators fell in behind them "at a distance" (A. 47).

> "Q. Did they follow them, or did they actually join the group or formation? A. They were following them" (A. 48).

The record is clear that the marchers and the crowd of spectators always constituted distinct groups: the former in an orderly formation of 52, the latter tagging along some distance behind (A. 20, 23-25, 41, 43-44, 57). The spectators—whose numbers were estimated at "several hundred people" (A. 20), or "over a thousand" (A. 48)—were in three locations: some stood on the inside (i.e., the building side) of the sidewalk where the marchers proceeded, at least at the beginning of the march (A. 44); others were on the sidewalk across from the marchers (A. 20, 23, 25); still others were in the middle of the street (A. 25). The police attempted to keep this latter group in the middle of the street (A. 57-58). Nevertheless, there is no evidence that the street was blocked by the crowd of spectators at any point, or that vehicles were obstructed. The one policeman who spoke to the question said he never saw any blocking of the street (A. 22-23).

The spectators were "all black" (A. 23). They were described as "following behind them [the marchers] singing, just loud comments and talking and all that, just generally a disorderly type crowd" (A. 48). Doubtless "disorderly" in this context means "disorganized" (see A. 20, 23), since there was no evidence of disorderly conduct or disorderly acts of any sort on the part of the crowd prior to the time of the arrest of the marchers. Following the arrests, "there was a lot of confusion going on" (A. 27) and "a lot of rock throwing" (*ibid.*), but the officer who testified to this said he did not have "any idea who threw the rocks" (A. 29), and he expressly declined to tie the rock throwing in with the marchers, who were arrested only for parading without a permit (A. 30-31).

It is uncontested that the marchers had no permit. A clerk in the office of the City Clerk testified that no permit for a parade or procession had been issued for Good

Friday, April 12 (A. 31-32). The record is silent as to whether any permit had been applied for. The clerk's book contained records only of permits issued, not of applications made or denied (A. 32). The clerk testified, on the basis of seventeen years experience in the Clerk's Office, that the sort of parades for which permits were customarily issued were held in the streets, not on the sidewalks, and that permits had not been issued for persons picketing, or simply walking on the streets, or for groups assembling and proceeding to board a bus:

"Q. You have seen a number of these parades, haven't you? A. Yes.

"Q. Have you noticed a parade down the streets or on the sidewalk? A. In the streets.

"Q. All in the street? A. Yes.

"Q. And did you notice whether or not these parades would have bands or vehicles in the procession? A. Yes.

"Q. They would? A. Yes.

"Q. And does one get a permit to picket, or just to parade? A. No.

"Q. Does one get a permit to just walk down the street? A. No.

"Q. Do you know whether or not at time when a group of Boy Scouts or Girl Scouts were going to load up on the bus, whether or not they would have to get a permit to get to the bus?

"The Court: That would be a legal question and she wouldn't be competent.

"Mr. Billingsley [counsel for petitioner]: The vital question is whether or not—what she has in the book there.

"A. We have not issued any" (A. 34-35).

Thereupon the trial court foreclosed further inquiry by petitioner's counsel into the nature of the groups, assemblies and processions for which permits had been issued (A. 35).

Petitioner Shuttlesworth's own role in the unpermitted Good Friday march is the subject of some dispute. One arresting officer, who observed the marchers for only about a half block prior to the time when he stopped and arrested them, testified that at the point of the arrest, Shuttlesworth was in the marching group, several rows back from the front (A. 21, 24-25). However, Shuttlesworth, unlike the other marchers, was not arrested at that point (A. 27, 37, 44, 51, 60-61, 68, 70, 71, 74, 78-79).[2] All other officers who testified said that Shuttlesworth was not within the marching formation, that he was not paired off in the line of march, but that he was seen moving from place to place along the curb side of the group, accompanying the group, and talking to them and to the spectators (A. 39-40, 41-43, 44, 48, 49, 50, 58-59). One officer described him as "bounding from the front to the rear and waving his arm to come on, telling them to come on" (A. 50). The other officers could not hear what Shuttlesworth was saying (A. 42, 59), but defense witnesses testified that he was telling the people to be quiet and orderly (A. 67, 69, 71-72, 73-74, 77-78), and Shuttlesworth himself added that he was also asking the crowd of spectators not to join the march formation (A. 77-78). It is not contested that Shuttlesworth was wearing an outfit—blue jeans and a black shirt—that was worn as well by other leaders of the march, Abernathy and Dr. King (A. 40, 46-47, 76, 79-80).

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[2] He was arrested an hour or two later, at a motel (A. 79).

II. The proceedings below.

September 28, 1963, petitioner was criminally charged by complaint in the Circuit Court for the Tenth Judicial Circuit of Alabama, the complaint alleging that he "did take part or participate in a parade or procession on the streets of the City [of Birmingham] without having secured a permit therefor from the commission, contrary to and in violation of Section 1159 of the General City Code of Birmingham of 1944 [set forth at pp. 4-5 *supra*]"[3] (A. 1).

He demurred to the complaint on the grounds, *inter alia*, that section 1159 was an unconstitutional abridgment of his federal First and Fourteenth Amendment rights, that it was facially unconstitutional because it deprived him without due process of the liberty guaranteed by the Fourteenth Amendment, and also because his prosecution under it violated the Equal Protection Clause of the same Amendment (A. 2-3). The demurrer was overruled (A. 6, 16), and he was put to trial before a jury on September 30 and October 1, 1963.

His Motion to Exclude the Testimony and for Judgment, made at the close of the prosecution's case, repeated his First and Fourteenth Amendment contentions, asserting that the conduct proved against him amounted to nothing more than the exercise of rights guaranteed by the Amendments; and it asserted also that there was no evidence to sustain his conviction (A. 4-5). This motion was overruled

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[3] Earlier, on May 15, 1963, petitioner was tried in the Recorder's Court of the City of Birmingham, convicted of violating §1159, and sentenced to 180 days at hard labor and a fine of $100. From this judgment, he took an appeal for trial *de novo* in the Tenth Judicial Circuit Court.

(A. 6-7, 65), renewed at the conclusion of defense testimony (A. 81), and again overruled (*ibid.*).

Petitioner was then convicted and sentenced to 90 days at hard labor, and an additional 48 days at hard labor in default of payment of a fine of $75 and taxable costs of $24 (A. 7-8).

His motion for a new trial, preserving the claims of error in denial of each of his earlier motions (A. 9-10) was overruled October 1, 1963 (A. 8). Petitioner filed his notice of appeal to the Court of Appeals of Alabama on the same day (*ibid.*). His specification of errors in that court again preserved all of his federal contentions (A. 86-87), and was treated by the court as presenting

> "three questions for decision: (1) whether §1159, supra, denies, on its face, due process of law; (2) whether or not the ordinance as applied violates *Yick Wo* v. *Hopkins*, 118 U. S. 356; and (3) the sufficiency of the evidence" (A. 89).

A majority of the Court of Appeals, Sixth Division, speaking through Judge Cates, agreed with petitioner's submissions on each of these three points. Reviewing the record, the court found that the case involved a march of fifty-two persons on the sidewalks of Birmingham (A. 89):

> "The group went along sometimes two, sometimes three, sometimes four, and at one time a witness saw one rank of six abreast. This observed bunching up coincided with the promenaders being blocked by officers parking police cars athwart the crossing at Fifth Avenue and Eighteenth Street.
>
> "There was no evidence that any of the group jaywalked, or that they got into the vehicular roadway

except at designated cross walks. Nor did they obstruct cars or pedestrians, nor disobey any traffic lights, or officers directing traffic. The only tendency toward showing disorderly conduct lay in evidence that some of the group sang and clapped hands" (A. 89-90).

This evidence, the court held, failed "to show a procession which would require, under the terms of §1159, the getting of a permit." Hence there was insufficient evidence to sustain conviction under the ordinance properly construed (A. 139-140). In any event, the ordinance was facially unconstitutional as a prior restraint on First Amendment freedoms, because it was a licensing law which allowed overbroad discretion to the licenser to censor constitutionally protected modes of peaceful expression and petition for redress of grievances[4] (A. 112-134). Finally, the experience of the Court of Appeals with the administration of §1159 by the City of Birmingham was convincing that the "pattern of enforcement exhibits a discrimination within the rule of *Yick Wo* v. *Hopkins*, supra" (A. 134-139). Accordingly, petitioner's conviction was reversed, November 2, 1965 (A. 155). Judge Johnson dissented (A. 144-54).

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[4] "Since the ony stated standards for refusing a permit are those of welfare, peace, safety, health, decency, good order, morals or convenience, we—in addition to overbroadness—find these words, as related to a parade, procession or demonstration, *either sufficiently lacking in preciseness or without a settled applicable common law meaning.*

"For example, in *Hague* v. *Committee* [307 U. S. 496 (1939)], . . . Roberts, J., aptly pointed out that peace on the streets could easily be achieved by suppression.

"In the context of long drawn out resort to congested courts for relief, these stated 'standards'—truly only sources of power, not means to an end—show §1159 to be void on its face" (A. 134, emphasis in original).

Respondent City of Birmingham petitioned the Supreme Court of Alabama for *certiorari* to review the judgment of the Court of Appeals (A. 157-161). The writ was granted January 20, 1966 (A. 162); and on November 9, 1967, the Supreme Court rendered its opinion reversing the Court of Appeals and sustaining petitioner's conviction (A. 163-178). The Supreme Court of Alabama first recited that:

> "In view of the fact that there was a dissenting opinion [in the Court of Appeals], we have gone to the original record to determine the facts. The majority opinion of the Court of Appeals does not contain a complete statement of the facts. However, the dissenting opinion of Judge Johnson contains a rather lengthy recitation of the facts and our examination of the original record shows that the facts as stated in the dissenting opinion are fully supported by the record" (A. 165-166).

However, Judge Johnson's opinion contains no factual findings that depart from those of Judge Cates' opinion for the Court of Appeals (although he did recite some additional, conflicting testimony without attempting to resolve the conflicts). He saw the appeal as involving "approximately 52 persons, most of whom were Negroes, [who] departed from a church . . ., grouped 'in formation' on the sidewalk in front of the church, and then walked 'in formation' along the sidewalks for several blocks" (A. 144). " 'Spectators' lining the route fell in behind and followed the group in formation as they passed by. This crowd of 'spectators'—consisting of several hundred persons—did not walk in formation and had no discernible

organization" (*ibid.*). "The group in formation sang and clapped hands as they proceeded along the sidewalk, but were otherwise orderly" (A. 145). One police officer testified that the group was marching "four to six abreast 'all the way across the sidewalk'" at the point he stopped it and arrested the marchers; that petitioner was in the line of march; and that the crowd of spectators was in the center of the street (*ibid.*). Another testified that the 52 marchers were always only two abreast; and that petitioner was not in the line of march, but walked alongside the marchers, giving them encouragement (*ibid.*). A third officer saw petitioner bounding up and down the line, telling the marchers to come on (*ibid.*). Defense witnesses supported the police versions of the march which reported the marchers paired in twos, with petitioner moving up and down the line talking to the marchers; and they testified that petitioner counseled the marchers to be quiet and orderly, and the spectators not to join the march (A. 146). Without resolving any of the factual controversies raised by this statement of the evidence, Judge Johnson had concluded that the Good Friday march was a parade required to be licensed by §1159 (A. 146-149); that §1159 was required by the First Amendment to be given an exceedingly narrow construction, but that—as so construed—it was facially constitutional (A. 149-153); and that no pattern of discriminatory enforcement appeared to be made out (A. 154).

The Supreme Court of Alabama announced that:

> "The dissenting opinion, unlike the majority opinion of the Court of Appeals, takes cognizance of the rule so often stated by the appellate courts of this state, to the effect that it is the duty of courts not to strike down a city ordinance or a statute as unconstitutional,

> if by reasonable construction it can be given a field of operation within constitutional limits and that where a statute or ordinance is susceptible of two constructions, one of which will defeat the ordinance or statute and the other will uphold it, the latter construction will be adopted" (A. 166).[5]

Employing this mode of approach to Birmingham General City Code §1159, as "susceptible of two constructions," the Supreme Court expressly approved Judge Johnson's restrictive interpretation of the ordinance (A. 168), drastically delimiting the discretion conferred on the Birmingham City Commission by the express terms of §1159, to refuse a permit for parades or processions if "in its judg-

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[5] Judge Cates did not in fact ignore the ordinary doctrines involving the presumption of constitutionality of legislation, but recognized the superior demands of this Court's First Amendment decisions, requiring more than ordinary "[p]recision of regulation" in areas of free expression. *N. A. A. C. P.* v. *Button*, 371 U. S. 415, 438 (1963); *Interstate Circuit, Inc.* v. *City of Dallas*, 20 L. ed. 2d 225, 231 (1968).

> "Ordinarily, a court in reviewing legislation will look at the remedy with the favoring intendment that all rationally connected mischiefs passed through the collective mind of the lawmakers. Thus the inhibition of conduct—though sometimes partly innocent—can find support in the state's police power if aimed at a substantial evil.
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> "Nevertheless, this balancing in First Amendment cases finds the scales weighted in the beginning in favor of the freedom which is sought to be restrained. As Rutledge, J., said in *Thomas* v. *Collins*, [323 U. S. 516 (1945)] . . ., at 529-530:
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> > " 'This case confronts us again with the duty our system places on this Court to say where the individual's freedom ends and the State's power begins. Choice on that border, now as always delicate, is perhaps more so where the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment . . .' " (A. 110).

ment the public welfare, peace, safety, health, decency, good order, morals or convenience require that it be refused," pp. 4-5 *supra*. The Supreme Court adopted Judge Johnson's tailoring of §1159 on the pattern of the New Hampshire ordinance that survived constitutional scrutiny in *Cox* v. *New Hampshire*, 312 U. S. 569 (1941) (see A. 168-170), as follows:

> "I think it obvious that this ordinance—Section 1159—was not designed to suppress in any manner freedom of speech or assembly, but to reasonably regulate the use of the streets in the public interest. It does not seek to control what may be said on the streets, and is applicable only to organize [sic] formations of persons, vehicles, etc., using the streets and not to individuals or groups not engaged in a parade or procession. The requirement that the applicant for a permit state the course to be travelled, the probable number of persons, vehicles and animals, and the purpose of the parade is for the purpose of assisting the municipal authorities in deciding whether or not the issuance of a permit is consistent with traffic conditions. Thus, the required information is related to the proper regulation of the use of the streets, and the fact that such information is required indicates that the power given the licensing authority was not to be exercised arbitrarily or for some purpose of its own. The requirement that the applicant state the purpose of the parade or procession does not indicate an intent to permit the Commission to act capriciously or arbitrarily. The purpose may have a bearing on precautions which should be taken by municipal authorities to protect parades or the general public.

"Section 1159, supra, provides that the Commission shall issue a permit 'unless in its judgment the public welfare, peace, safety, health, decency, good order, morals or convenience require that it be refused.' I do not construe this as vesting in the Commission an unfettered discretion in granting or denying permits, but, in view of the purpose of the ordinance, one to be exercised in connection with the safety, comfort and convenience in the use of the streets by the general public. The standard to be applied is obvious from the purpose of the ordinance. It would be of little or no value to state that the standard by which the Commission should be guided is safety, comfort and convenience of persons using the streets, and, due to varying traffic conditions and the complex problems presented in maintaining an orderly flow of traffic over the streets, it would be practically impossible to formulate in an ordinance a uniform plan or system relating to every conceivable parade or procession. The members of the Commission may not act as censors of what is to be said or displayed in any parade. If they should act arbitrarily, resort may be had to the courts. It is reasonable to assume from the facts in this case that the Commission would have granted appellant a permit to engage in the parade if such permit had been sought. A denial would have been warranted only if after a required investigation it was found that the convenience of the public in the use of the streets at the time and place set out in the application would be unduly disturbed" (A. 166-168).

To this construction of §1159, the Supreme Court added the observation that it did not interpret the ordinance as

conferring on the Birmingham City Commission "the right to refuse an application for a permit to carry on a parade, procession or other public demonstration solely on the ground that such activities might tend to provoke disorderly conduct. See *Edwards* v. *South Carolina,* 372 U. S. 229 . . . ." (A. 170). Paraphrasing the language of the *Cox* opinion, *supra,* 312 U. S. at 576, the court said:

> "We also hold that under §1159 the Commission is without authority to act in an arbitrary manner or with unfettered discretion in regard to the issuance of permits. Its discretion must be exercised with uniformity of method or treatment upon the facts of each application, free from improper or inappropriate considerations and for unfair discrimination. A systematic, consistent, and just order of treatment with reference to the convenience of public use of the streets and sidewalks must be followed. Applications for permits to parade must be granted if, after an investigation it is found that the convenience of the public in the use of the streets or sidewalks would not thereby be unduly disturbed" (A. 170-171).

Fitted out with this construction, the ordinance was sustained in reliance upon *Cox* and upon a phrase in *Walker* v. *Birmingham,* 388 U. S. 307, 317 (1967), to the effect that "it could not be assumed that the ordinance [Birmingham General City Code §1159] was void on its face" (A. 171-173). The Alabama Supreme Court acknowledged that "[p]erhaps we have placed too much reliance on *Walker* . . . and on *Cox* . . ." (A. 176), but opined that, "If so, we will no doubt be set straight" (*ibid.*). It summarily rejected the holdings of the Court of Appeals that the Good Friday march was not a "parade or procession or other public demonstration on the streets or public ways" of

Birmingham required to be licensed under §1159 (A. 175-176); and that §1159 had been discriminatorily enforced by the Birmingham authorities (A. 174-175). Petitioner's conviction was therefore sustained (A. 177-178).

An application for certiorari to review the judgment of the Alabama Supreme Court was granted by this Court on April 22, 1968.[6] Trials of approximately 1500 other civil rights demonstrators, arrested during this and other demonstrations occurring over a period of several weeks in the Spring of 1963, in Birmingham and charged, like petitioner Shuttlesworth, only under Birmingham General City Code §1159, are pending the outcome of this case.

Summary of Argument

This prosecution is now more than five years old. It had its origins in a classic, peaceful civil rights demonstration[7] in the City of Birmingham in 1963—a time "when Birmingham was a world symbol of implacable official hostility to Negro efforts to gain civil rights, however peacefully sought."[8] Together with Birmingham's cognate prosecutions of petitioner Shuttlesworth, it stands, in the apt words of Mr. Justice Murphy on another like occasion, "as a monument to man's intolerance of man. Seldom if ever in the history of this nation has there been

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[6] The judgment of the Supreme Court of Alabama was entered on November 9, 1967 (A. 177). Mr. Justice Black extended the time for filing a petition for certiorari until March 8, 1968; and the petition was timely filed on March 7.

[7] As in *Edwards* v. *South Carolina*, 372 U. S. 229, 235 (1963), "The circumstances in this case reflect an exercise of these basic constitutional rights [of free speech, free assembly, and freedom to petition for redress of grievances] in their most pristine and classic form."

[8] *Walker* v. *City of Birmingham*, 388 U. S. 307, 338-339 (1967) (Mr. Justice Brennan, dissenting).

such a concentrated and relentless crusade to [convict] . . . an individual because he dared to exercise the freedom that belongs to him as a human being and that is guaranteed to him by the Constitution."[9] See *In re Shuttlesworth*, 369 U. S. 35 (1962); *Shuttlesworth* v. *City of Birmingham*, 373 U. S. 262 (1963); *Gober* v. *City of Birmingham*, 373 U. S. 374 (1963); *Shuttlesworth* v. *City of Birmingham*, 376 U. S. 339 (1964); *Shuttlesworth* v. *City of Birmingham*, 382 U. S. 87 (1965); *Walker* v. *City of Birmingham*, 388 U. S. 307 (1967).

This most recent *Shuttlesworth* prosecution presents, in essence, one blunt question. Petitioner Shuttlesworth and the other religious leaders of the civil rights movement in Birmingham at the Easter season of 1963 were confronted with a pair of clear legal edicts. The first was Birmingham's parade-permit ordinance, §1159. While the scope of its prohibition was far from certain, one thing about it was plain beyond peradventure. Its grant of discretion to the Birmingham City Commission to refuse a permit when "in its judgment the public welfare, peace, safety, health, decency, good order, morals or convenience require that it be refused," was as palpably and indisputably unconstitutional as language can make a law. This Court had so held in a dozen controlling decisi ns. The second clear legal edict was the doctrine of this Court, announced repeatedly, unqualifiedly, and in terms precisely applicable to the Birmingham situation, that ordinances like §1159, void for the reasons that §1159 was void, might safely be ignored, and that arrests and prosecutions for their violation were unconstitutional.

Birmingham's civil rights leaders took this Court at its word. They ignored §1159, organized their followers in

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[9] *Bridges* v. *Wixon*, 326 U. S. 135, 157 (Mr. Justice Murphy, concurring).

carefully marshalled, peaceable public demonstrations against racial injustice, and marched during Easter Week. The marchers were arrested in droves, unconstitutionally, if this Court's decisions are the law of the Constitution. They were criminally charged in droves, unconstitutionally as any lawyer, and virtually any literate layman, must have known. Petitioner Shuttlesworth's prosecution proceeded through the Alabama courts as the case to test Birmingham's assertion of a licensing power palpably forbidden by the Constitution. He was convicted in the Recorder's Court, and again in the Circuit Court. Two and a half years after his arrest the Court of Appeals of Alabama, by Judge Cates, read Birmingham General City Code §1159 as it was written, tested it by this Court's First Amendment decisions, and reversed petitioner's conviction. Two additional years later, the Alabama Supreme Court, equally conscious that the ordinance as written and as theretofore understood was void, performed an extreme work of judicial surgery, excised from §1159 express language conferring a discretion to license parades according to the licenser's judgment of public "peace," "decency," "good order," and "morals," wrapped the remainder of the ordinance in the verbal trappings of *Cox* v. *New Hampshire,* 312 U. S. 569 (1941), and so sustained petitioner's conviction of 90 days at hard labor, with an additional 48 days in default of fine and costs.

Thereby, in 1967, the Alabama Supreme Court sought to render retroactively criminal the peaceful civil rights demonstrations that had been, in 1963, constitutionally protected. It sought to render constitutional the arrests of the demonstrators and the repression of their demonstrations that had been, in 1963, constitutionally forbidden. The question now presented is whether any such course of judicial proceedings, converting constitutional rights

ex post facto into criminal liabilities, is itself consistent with the First and Fourteenth Amendments. We think the answer obvious. It is not consistent with the Constitution, for several reasons.

First, this Court has held in an unbroken line of decisions from *Lovell* v. *Griffin,* 303 U. S. 444 (1938), to *Interstate Circuit, Inc.* v. *City of Dallas,* 20 L. ed.2d 225 (1968), that a licensing regulation subjecting the exercise of First Amendment freedoms to the prior restraint of a permit requirement, administered at the discretion of officials in "'the absence of narrowly drawn, reasonable and definite standards for the officials to follow,'" *id.* at 235, is facially unconstitutional and void. The *Lovell* case and subsequent decisions abutting at *Staub* v. *Baxley,* 355 U. S. 313 (1958), hold expressly that persons subject to licensing under such an unconstitutional and void regulation may ignore it, and exercise their rights of free expression without applying for a license. Those decisions control this case. If there remains any meaning to the concept of facial unconstitutionality of an ordinance that broadly and vaguely overshadows free expression with the pall of censorship, Birmingham's §1159 is undisputably bad on its face. Petitioner cannot therefore be punished for refusing to submit to it, however §1159 may be verbally twisted by the Alabama courts four and a half years after the fact.

Second, the rationale of the *Lovell-Staub* line of decisions embodies a principle, vital to the life of the First Amendment, which petitioner's conviction affronts. Increasingly in recent years this Court has refused to permit governmental authority to extend over the range of constitutionally protected speech activity broad "penal statute[s] susceptible of sweeping and improper application." *N. A. A. C. P.* v. *Button,* 371 U. S. 415, 433 (1963).

Increasingly, it has refused to permit governments to force the citizen who seeks to exercise his constitutional rights of free speech to risk prosecution and conviction under such statutes. *Dombrowski* v. *Pfister,* 380 U. S. 479 (1965). Birmingham's §1159 is a prime instance of the sort of censorial legislation which these decisions condemn. Legislation of the kind abounds, notwithstanding its unconstitutionality, for the obvious reason that its vague strictures permit local authorities to assert a power which, at least until challenged, is effective to repress any and all unpopular or dissentient activity. The course of petitioner's treatment by the Alabama courts demonstrates the final link in the chain by which the repressive force of these statutory schemes is secured. A retroactive retraction of the statute's ostensible scope, worked in the course of a criminal prosecution and employed to validate a conviction, makes challenge to the statute dangerous. Challenge thus discouraged, the broad statutes are left exactly that wide play which this Court has found inimical to federally protected free speech. This result—and petitioner's conviction that subserves it—are clearly unconstitutional.

Third, the due process guarantee of the Fourteenth Amendment protects the petitioner against criminal conviction for conduct undertaken squarely within the protection of controlling decisions of this Court. Petitioner did only what the time-honored *Lovell* and *Staub* decisions, *supra,* had announced he could do with immunity. The constitutional command of fair notice of potential criminal liability must protect, at the least, one who acts squarely within the scope of immunities authoritatively pronounced by the highest court of the Nation. No *ex post facto* shift in the basis of the prosecution can deprive him of this protection. And, in petitioner's case, the vice of lack of

notice was compounded by the vague scope of prohibition of §1159, which the Alabama Supreme Court, reversing the Alabama Court of Appeals, applied to the Good Friday march in violation of the principle that regulations affecting First Amendment conduct must be restrictively construed.

Fourth, for all the verbal efforts of the Alabama Supreme Court to twist Birmingham General City Code §1159 into constitutionally allowable shape, the ordinance remains unconstitutional. This is so because, whatever the standards which the opinion of the Supreme Court has said should govern administration of permits under §1159, neither the section nor generally applicable Alabama procedure provides practical administrative and judicial safeguards to insure the enforcement of those standards in a fashion consistent with the Constitution. In the absence of such "'procedural safeguards designed to obviate the dangers of a censorship system,'" *Teitel Film Corp.* v. *Cusack,* 309 U. S. 139, 141 (1968)—specifically, provisions for regular and recorded administrative processing of application, and for speedy and effective judicial review of their denial—§1159 continues to maintain a regime of unconstitutional prior restraint upon free expression.

The sum of the matter is that the Good Friday march in 1963 was dubiously subject to the strictures of the Birmingham permit ordinance, §1159; §1159 granted such broad discretion to Birmingham city officials that it was inconceivable that any court could give it a construction narrow enough to save its constitutionality; official hostility toward civil rights was a matter of public record throughout the world; there existed the overwhelming probability that Birmingham officials would exercise their unfettered discretion to frustrate petitioner's peaceful pro-

test activities; there was an absence of state judicial procedures to promptly and effectively correct abusive exercises of that discretion or to delimit that discretion; and prior decisions of this Court taught petitioner that he need not submit to an unconstitutional prior restraint upon free expression. Given the concurrence of these circumstances, petitioner's conviction can hardly be squared with due process of law.

ARGUMENT

I.

Petitioner's Conviction Must Be Reversed Because Birmingham General City Code §1159 Was, as Written and in Force in 1963, a Facially Unconstitutional and Void Prior Restraint Upon Free Expression; and Petitioner Cannot Constitutionally Be Punished for Failing to Comply With Its Permit Requirement.

We think there can be no doubt that §1159, prior to the excision of half its operative language and curtailment of the rest by the Supreme Court of Alabama in 1967, was blatantly unconstitutional. Decisions of this Court stretching over a period of thirty years condemned it as a prior restraint upon forms of free expression because it subjected constitutionally protected speech to the requirement of prior licensing without " 'narrowly drawn, reasonable and definite standards for the officials to follow.' " *Interstate Circuit, Inc.* v. *City of Dallas,* 20 L. ed. 2d 225, 235 (1968). See *Lovell* v. *Griffin,* 303 U. S. 444 (1938); *Hague* v. *C. I. O.,* 307 U. S. 496 (1939); *Schneider* v. *State,* 308 U. S. 147 (1939) (Schneider's case); *Cantwell* v. *Connecticut,* 310 U. S. 296 (1940); *Largent* v. *Texas,* 318 U. S. 418 (1943); *Jones* v. *Opelika,* 316 U. S. 584, 600-603 (Chief

Justice Stone, dissenting), 611, 615 n. 5 (Mr. Justice Murphy, dissenting) (1942), *vacated and previous dissenting opinions adopted per curiam,* 319 U. S. 103 (1943); *Marsh* v. *Alabama,* 326 U. S. 501 (1946); *Tucker* v. *Texas,* 326 U. S. 517 (1946); *Saia* v. *New York,* 334 U. S. 558 (1948); *Kunz* v. *New York,* 340 U. S. 290 (1951); *Niemotko* v. *Maryland,* 340 U. S. 268 (1951); *Joseph Burstyn, Inc.* v. *Wilson,* 343 U. S. 495 (1952); *Gelling* v. *Texas,* 343 U. S. 960 (1952); *Superior Films, Inc.* v. *Department of Education,* 346 U. S. 587 (1954); *Commercial Pictures Corp.* v. *Regents,* 346 U. S. 587 (1954); *Holmby Productions, Inc.* v. *Vaughn,* 350 U. S. 870 (1955); *Staub* v. *Baxley,* 355 U. S. 313 (1958); *Cox* v. *Louisiana,* 379 U. S. 536, 553-558 (1965); cf. *Shuttlesworth* v. *City of Birmingham,* 382 U. S. 87 (1965).

These decisions variously exemplify the settled First Amendment doctrine that "an ordinance which . . . makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official—is an unconstitutional censorship or prior restraint upon the enjoyment of these freedoms." *Staub* v. *Baxley, supra,* 355 U. S. at 322. It is obviously difficult to imagine an ordinance more palpably obnoxious to this doctrine than §1159, requiring permits from the City Commission for parades, processions or public demonstrations and authorizing the Commission to deny a permit if "in its judgment the public welfare, peace, safety, health, decency, good order, morals or convenience require that it be refused." Judge Cates, for the Court of Appeals, aptly characterized this grab-bag of illimitable police powers, tricked out as "standards" for permit denial, when he observed that they were "truly only sources of power, not means to an end"

(A. 134). We take it that the Alabama Supreme Court agreed when, for the express purpose of saving the ordinance and validating petitioner's conviction, it read half of the "standards" ("peace," "decency," "good order," "morals") out of §1159, and construed the remaining half as circumlocutions for traffic control.

But this drastically restrictive reading came on the appeal in petitioner's case, four and a half years after the Good Friday march and his arrest. The Alabama Supreme Court's commendable efforts to save the constitutionality of the Birmingham parade permit ordinance do not and cannot affect that ordinance as it confronted petitioner Shuttlesworth and the other Negro clergymen who were leading the civil rights demonstrations for racial justice in the Easter season of 1963. *That* ordinance was unconstitutional. It was, as the decisions cited in the first paragraph of this subsection, *supra,* quite plainly say, unconstitutional "on its face." And this Court has time and again held that such an ordinance—precisely the sort of licensing ordinance that §1159 is, and constitutionally bad for precisely the same reasons that §1159 is bad—need not be complied with. One who is subject to its facially invalid licensing requirement may ignore it, and engage with constitutional immunity in the exercise of all those rights of free expression for which the ordinance purports to demand a license.

This has been the law of the Constitution since *Lovell* v. *Griffin,* 303 U. S. 444 (1938), *supra.* Because the licensing ordinance there challenged conferred impermissibly broad discretion to permit or refuse First Amendment activity, that ordinance was void on its face; and since it was "void on its face, it was not necessary for [Lovell] . . . to seek a permit under it," *id.* at 452. The *Lovell* doc-

trine was followed in *Schneider* v. *State, supra; Largent* v. *Texas, supra;* and *Jones* v. *Opelika, supra,* all of which decisions reversed the convictions under facially invalid licensing regulations of persons who had refused to apply for the required licenses. *Staub* v. *Baxley,* 355 U. S. 313 (1958), succinctly reaffirmed the principle. The lower courts in *Staub* had held that failure to seek a permit and thus to test the discretion of the licensing authorities precluded a criminal defendant charged with violation of a permit ordinance from assailing the ordinance for overbroad discretion. This Court reversed.

> "This is not an adequate nonfederal ground of decision. The decisions of this Court have uniformly held that the failure to apply for a license under an ordinance which on its face violates the Constitution does not preclude review in this Court of a judgment of conviction under such an ordinance. . . . 'The Constitution can hardly be thought to deny to one subjected to the restraints of such an ordinance the right to attack its constitutionality because he has not yielded to its demands.' . . ." (*Id.* at 319.)

Accord: Freedman v. *Maryland,* 380 U. S. 51, 56-57 (1965).

It is quite impossible, we submit, to sustain petitioner's conviction without overruling either the long line of decisions collected in the first paragraph of this subsection or the *Lovell-Staub-Freedman* line of cases cited in the preceding paragraph. Petitioner Shuttlesworth and the Easter demonstrators in the City of Birmingham in 1963 took this Court literally at its word. They were confronted with a facially invalid licensing ordinance. As this Court had said they might, they ignored it and marched without applying for or obtaining a license. Petitioner has been convicted for that act, and for that act only. But that act

is constitutionally immune from punishment, so long as *Lovell, Staub* and *Freedman* state the law of the First Amendment. We fail to perceive any logic by which the cases may be distinguished.

In saying this, we do not ignore *Cox* v. *New Hampshire*, 312 U. S. 569 (1941). In *Cox*, demonstrators marched without applying for or getting a license under an ordinance which required a license for parades and failed to prescribe standards for its issuance. On review of the demonstrators' convictions for parading without a license, the New Hampshire courts construed the ordinance as a traffic-control regulation, implying strict and judicially reviewable standards for the licensing function. They sustained the convictions, as did this Court. As the Court saw the case, the *Cox* ordinance was not facially unconstitutional. 312 U. S. at 576-578.

We are quick to concede that the basis for this latter holding is more than a little unclear. It may have been based on the fact that the *Cox* ordinance, unlike Birmingham General City Code §1159, did not affirmatively and explicitly embody impermissible licensing standards, authorizing denial to demonstrators of access to the streets whenever, in the judgment of the City Commission, considerations of "peace," "decency," "good order," "morals," etc. required that a license be refused. (See pp. 4-5 *supra.*) It may be, also, that when Cox marched in the year 1939, the unconstitutionality of a licensing ordinance lacking narrow and specific standards was not as patently and palpably clear as thirty years of decisions by this Court have now made it. Certainly it is the case that, in 1941 when *Cox* was decided, this Court had not had the long experience which it has since had with the dangers of unbridled discretion in the licensing of constitutionally protected

speech activity—an experience which has led it to develop several related constitutional doctrines for the strict confinement of such discretion. See, e.g., *Baggett* v. *Bullitt*, 377 U. S. 360 (1964); *N. A. A. C. P.* v. *Button*, 371 U. S. 415 (1963); *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965); *Elfbrandt* v. *Russell*, 384 U. S. 11 (1966); *Ashton* v. *Kentucky*, 384 U. S. 195 (1966); *Keyishian* v. *Board of Regents*, 385 U. S. 589 (1967); *Interstate Circuit, Inc.* v. *City of Dallas*, 20 L. ed. 2d 225 (1968); and the cases cited in the first paragraph of this subsection.

It may be, finally, that in 1941, this Court was indisposed to recognize for protest marches on the public streets and similar forms of expression the same degree of First Amendment protection against official censorship that it had accorded leafleting in the *Lovell* and *Schneider* cases, *supra*, and nonambulatory public assemblies in the *Hague* case, *supra*. But the doctrines of *Lovell*, *Schneider* and *Hague* have since been applied to all forms of free speech, expression and petition. *Saia* v. *New York*, 334 U. S. 558 (1948) (sound trucks); *Kunz* v. *New York*, 340 U. S. 290 (1951) (street assemblies); *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495 (1952) (motion pictures); *Cox* v. *Louisiana*, 379 U. S. 536, 553-558 (1965) (street processions and demonstrations). Protest marches are no longer considered, as they once were, dubious candidates for any First Amendment protection. See *Edwards* v. *South Carolina*, 372 U. S. 229 (1963); *Henry* v. *City of Rock Hill*, 376 U. S. 776 (1964); *Amalgamated Food Employees Union Local 590* v. *Logan Valley Plaza, Inc.*, 88 S. Ct. 1601, 1605-10 (1968); *Davis* v. *Francois*, —— F. 2d ——, 5th Cir., No. 25562, decided May 28, 1968. Whatever other restraints may constitutionally be placed upon such marches, by virtue of their physical character, it is now plain that they may not be disallowed or allowed at the arbitrary will of a cen-

sorial permit authority. *Cox* v. *Louisiana, supra;* cf. *Shuttlesworth* v. *City of Birmingham,* 382 U. S. 87 (1965).

Whatever may be the basis, however, of the Court's view in *Cox* v. *New Hampshire,* that the ordinance there considered was not facially void, the point remains that that *was* the view the Court took of the case. *Cox* did not purport to overrule the holdings of *Lovell* and *Schneider* that one cannot be punished for failure to submit to a facially unconstitutional licensing ordinance; and it could not, of course, overrule subsequently decided cases to the same effect, such as *Largent, Jones, Staub* and *Freedman.* At most, the upshot of *Cox* is to compel a distinction between ordinances which are *facially* bad and those which are not (although they may be unconstitutionally applied).[10] The bases for such a distinction, in the realm of licensing or permit ordinances, are not indisputably evident in light of *Cox.* Perhaps the bellwether of differentiation is the question whether the ordinance expressly sets forth unconstitutional licensing standards (like §1159), or whether it merely lacks standards (like the *Cox* ordinance). Perhaps it is the question whether the ordinance is unconstitutional with regard to the full range of speech conduct

[10] The archetype of the latter sort of ordinance is the one involved in *Poulos* v. *New Hampshire,* 345 U. S. 395 (1953). Although lacking in explicit standards for the issuance of permits, the *Poulos* ordinance had been judicially supplied with standards of the constitutionally requisite specificity *prior to the time* Poulos applied for a permit, had the application denied, and engaged in unpermitted conduct in violation of the ordinance. For the *Poulos* ordinance was identical to the one considered in *Cox* v. *New Hampshire, supra;* in the *Cox* litigation, concluded before Poulos' application, the New Hampshire courts had narrowly construed the ordinance and set forth standards for its administration, and this Court had sustained it as so construed. Thus, Poulos was on notice both that the ordinance, as a matter of New Hampshire law, contained constitutionally adequate standards, and, as a matter of federal law, that it was constitutional by force of a recent controlling decision of the highest court of the land.

which it seeks to regulate (like §1159), or whether it might constitutionally be applied to some forms of expression.[11] Perhaps it is the question whether the ordinance is plainly, palpably, clearly, undisputably unconstitutional (like §1159). Our submission here may accept any of these or other rationally conceivable distinctions. For it remains evident that, under any of them, §1159 is facially bad.

The only test for facial constitutionality which would not condemn §1159, we suggest, would be the question whether an ordinance is incapable of any *post facto* judicial construction, however implausible or distorting—however it may read plain language out of the ordinance or put unexpectable and inconsistent language in—which may remake the regulation in a constitutional form. And *this*, obviously, cannot be the First Amendment test. For, as the present case demonstrates, there is no ordinance, no assemblage of words or form of language, which cannot be twisted after the fact to mean what it does not say, by a court having the raw power and the will to do so. It need not impugn the conduct of the Alabama Supreme Court—indeed, it may be a credit to that Court—to recognize that

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[11] The test of facial constitutionality is plainly not whether the ordinance might constitutionally be applied to *any* sort of conduct, including conduct outside the realm of protection of the First Amendment. In *Schneider* v. *State, supra,* where the Court allowed a religious colporteur who had not applied for a permit to challenge the applicable permit regulation, for example, the regulation was voided "on its face" as applied to religious solicitors, while the question was expressly reserved whether "commercial soliciting and canvassing may not be subjected to such regulation as the ordinance requires." 308 U. S. at 165. And in *Largent* v. *Texas, supra,* the Court similarly reversed the conviction of an evangelist who had not applied for a license, in a case where the Court's jurisdiction on appeal from a lower state court depended precisely on the theory that the ordinance was not void in every possible application. See 318 U. S. at 421-422.

its surgical performance on §1159 is simply staggering. It has remade the ordinance out of whole cloth, in attempted deference to the Constitution. But the consequence of this performance for the Easter, 1963 Birmingham civil rights demonstrators, and its lesson for future demonstrators who confront palpably unconstitutional licensing regulations like §1159, is entirely destructive. Such a performance—if it is permitted retroactively to sustain petitioner's conviction—means that the *Lovell-Staub-Freedman* doctrine is rendered nugatory, deprived of all contemporary vitality—except, perhaps, in the case of a state court which neglects to do its constitutional homework before, predictably, affirming a demonstrator's criminal conviction.

We submit that this Court should tolerate no such evasion of *Lovell, Staub* and *Freedman*. Of course, the state courts should not be dissuaded from construing their legislative enactments in a constitutional fashion—or even from torturing them to that end, if necessary. But individuals who exercise their First Amendment rights of free speech, assembly and petition prior to the torturing state judicial construction of an ordinance that is plainly facially invalid as written should and must be protected. No other conclusion would allow the First Amendment that effective range of operation, that "breathing space," which this Court has repeatedly declared it must have. *N. A. A. C. P.* v. *Button*, 371 U. S. 415, 433 (1963); *Dombrowski* v. *Pfister*, 380 U. S. 479, 486-487 (1965).

This is so because the application of the *Cox* doctrine below makes *Cox* the instrument for validation and perpetuation of unconstitutional licensing regimes. If the decision of the Alabama Supreme Court stands, every licensing

regulation, however broad the discretionary power it appears to confer upon licensing authorities over the speech activity of the persons required to be licensed, must be obeyed. The resultant damper on constitutionally guaranteed freedoms of expression is obvious. The States are permitted and encouraged to hold out a broad and overhanging threat of greater prior censorship than the First Amendment permits them to exact. So long as the threat is effective and fear of attendant criminal penalties discourages challenge to it, the censorship exerts its full, unconstitutional repressive effect. When and if a challenge is mounted, the state courts (which may or may not be the highest court of a State) announce that the statutory regulation does not mean what it plainly says, and—without removing the overbroad language from the statute books, where it remains to be invoked by the licenser and to cow laymen subject to regulation under it—give it some *post hoc* verbal construction designed and sufficient to bring it barely back across the line of constitutional condemnation. The reward of the citizen for successful constitutional challenge is thus a criminal conviction; challenge is discouraged; and the flourishing of broad reigns of censorship—which appear still to be widespread, notwithstanding this Court's repeated condemnation of them[12]—is approved.

Just this sort of regulation of speech conduct, wherein a State undertakes to threaten by ostensible prohibition a broader range of protected activities than it can con-

[12] The Jackson, Mississippi ordinance recently condemned in *Guyot* v. *Pierce*, 372 F. 2d 658 (5th Cir. 1967), for example, was a portion of the Uniform Traffic Code. See also, e.g., *Baker* v. *Bindner*, 274 F. Supp. 658 (W. D. Ky. 1967); *Gamble* v. *City of Dublin*, 375 F. 2d 1013 (5th Cir. 1967); *King* v. *City of Clarksdale*, 186 So. 2d 228 (Miss. 1966).

stitutionally forbid, has been voided by this Court in numerous contexts other than licensing laws. E.g., *Bantam Books, Inc.* v. *Sullivan,* 372 U. S. 58 (1963); *N. A. A. C. P.* v. *Button,* 371 U. S. 415 (1963); *Dombrowski* v. *Pfister,* 380 U. S. 479 (1965); *Keyishian* v. *Board of Regents,* 385 U. S. 589 (1967). The teaching of these cases is that such sweeping forms of regulation, asserting State authority to prohibit conduct which the First Amendment protects, are intolerable to the Amendment, whether or not the State can, in the end, make good its threat of prohibition in every case encompassed by the assertion. What is impermissible, what is constitutionally forbidden, is the existence of this sort of dragnet restraint upon precious freedoms of expression.

But the decision below has exactly the effect of vindicating and preserving such a dragnet restraint, by making attack upon it impracticable. For it is clear that what the Alabama Supreme Court has done here is retroactively to validate some 1500 criminal charges, plainly the impermissible incidents of an unconstitutional licensing procedure when made in 1963, by wrapping them about with the verbal habiliments of the *Cox* opinion.[13] Not only does

[13] The Alabama Supreme Court's reliance upon *Walker* v. *City of Birmingham,* 388 U. S. 307 (1967), gives it no additional support. That case spoke to the right of the citizen to flout a judicial injunction, a question not involved here. The Alabama Supreme Court drew upon *Walker* not for any implications that that decision might have for the *Lovell-Staub-Freedman* principle—as to which it has none—but to support the holding that §1159 was constitutional. But it was only in the context of the question whether a judicial decree embodying the ordinance might be ignored that the *Walker* majority said, 388 U. S. at 317, that "it could not be assumed [§1159] . . . was void on its face." And the Chief Justice, in a dissenting opinion in which Justices Brennan and Fortas joined, found §1159 "patently unconstitutional on its face." 388 U. S. at 328.

this have the effect of legalizing the illegal conduct of the Birmingham authorities—and illegalizing the legal conduct of the 1500 Birmingham civil rights demonstrators—in 1963; it leaves Birmingham General City Code §1159 and literally hundreds of cognate statutes and ordinances[14] lying about like so many traps against future free speech activity. Even in the case of §1159 itself, which has now been given an authoritative if belated limiting construction, the danger of irremediable unconstitutional application remains intense, both because of the gap between the limiting construction and what the face of the ordinance appears to countenance, and because of the absence in Alabama of any administrative or judicial machinery serviceable to make the limiting construction more than verbal. (See part III, *infra.*) And, of course, the danger is greater still in the case of other, similar but as yet unconstrued licensing statutes and ordinances, to which the effect of the decision below is to enforce compliance.

The extent of this danger is apparent upon consideration of the alternatives open to the citizen wishing to participate in speech conduct for which such a statute or ordinance requires a license. He may sue the licensing authority to have the regulation declared invalid as an unconstitutional prior restraint. *Dombrowski* v. *Pfister, supra; Zwickler* v. *Koota,* 389 U. S. 241 (1967). This is a valuable but luxurious remedy, available only to those with abundance of time, means, and legal services—hardly to be relied upon as a general safeguard of the Constitution. He may refuse to make application for a license, and attempt to challenge the constitutionality of the statute or ordinance when he is prosecuted for its violation. The

[14] See note 12 *supra.*

decision below effectively forecloses this course to all save the foolhardy. Or he may submit to the licenser's discretion, apply for a license, and—if his application is denied—seek some form of judicial review of the denial. This last alternative is the one which the Court in *Lovell, Staub* and *Freedman* expressly held could not constitutionally be imposed upon the citizen, for good reason.

In the first place, a system of enforced compliance with overbroad licensing laws presents no real means of challenging their coercive effect because in practice it preserves wide open, operative and unchallengeable the discretion in the issuer of the licenses. We develop in greater detail, in part III *infra*, the vicissitudes that mine the route of one who seeks, in Alabama, to enforce his constitutional rights by applying for a license and obtaining review of its denial. For present purposes it is enough to note the several circumstances that make virtually insuperable the difficulty of proving a case of judicially revisable arbitrary or discriminatory enforcement of a permit law: the facts that the administrative decision is not required to be made on a record following regularized procedures; that it is not required to be supported by any statement of reasons; and that there is not even required to be kept any administrative log or recording of permit applications and denials. These conditions, together with the prospect of delay involved in any judicial challenge, make the effective and timely reversal of the denial of a permit application in any particular case highly unlikely. And, in any event, no general construction of the overbroad permit law is assured by this route; while facial challenge to it is, of course, denied.

But there is, in the second place, a broader practical justification for this Court's consistent position that a citizen should be free to refuse to submit to a licensing scheme which has a coercive effect upon First Amendment rights. These overbroad laws are numerous and their prior restraints affect large numbers of persons who cannot be supposed to have the knowledge or the resources to combat them by prolonged administrative and judicial challenge. Those who must take to the streets to air their grievances are, more than ordinarily, simple people, deprived people, people whose needs to speak out are urgent and who choose the streets as the forum for their speech precisely because they lack the power, the influence, and the financial means to make their voices effective in administrative or judicial councils. The first effective legal spokesman they are likely to have, capable of speaking the language that moves administrators and courts, is the lawyer appointed for them after they are criminally charged. In the present case alone, 1500 Negro citizens of the City of Birmingham were subjected to the prior restraints of the Birmingham parade ordinance, in several separate incidents, during the Easter season of 1963. If they had sought parade permits under the law, it was and is speculative what construction would have been put upon §1159 by the Birmingham authorities or the Alabama courts—except, of course, that the liberality and fairness announced in 1967 by the Alabama Supreme Court, as canons for the application of §1159, could hardly have been expected.[15] It is

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[15] See UNITED STATES COMMISSION ON CIVIL RIGHTS, 1963 REPORT 112 (1963):

> "The official policy in . . . Birmingham, throughout the period covered by the Commission's study, was one of suppressing street demonstrations. While police action in each

the dissenting opinion of Judge Johnson in the Court of Appeals, to the effect that: "If they [the Commissioners] should act arbitrarily, resort may be had to the courts" (A. 168). This sentence is also the only discussion of procedural matters throughout Judge Johnson's opinion. Judge Cates' majority opinion for the Court of Appeals, voiding §1159, does undertake a detailed study of the ordinance, in comparison with the Model Ordinance Regulating Parades, drafted by NIMLO, the National Institute of Municipal Law Officers. That analysis discloses that §1159 comports no regular administrative procedures, and that its procedures for review of the initial administrative determination are: "None, except to courts, presumably by way of mandamus with alternative prayer for certiorari" (A. 123; see A. 117-123).

Our own understanding of Alabama law is also that mandamus would be the available remedy for review of administrative discretion (however defined) in denial of a permit under an ordinance like §1159. See *Payne* v. *Spragins,* 207 Ala. 264, 92 So. 466 (1922); cf. *Rodgers* v. *Meredith,* 274 Ala. 179, 146 So. 2d 308 (1962). The extraordinary writ proceeding must be first brought in the Circuit Court, *In re Giles,* 133 Ala. 211, 32 So. 167 (1902); from an adverse decision by that court, appeal goes to the Supreme Court of the State. Ala. Code Ann. Tit. 7, §1074 (Recomp. vol. 1960). The statutory provisions governing procedure in mandamus and like proceedings in the Circuit Court are contained in *id.* §§1072-1080. Neither in these provisions nor in any applicable rule of court does there appear any time limit upon judicial consideration of an

equally speculative how long the demonstrators would have been in court—had they been able to take their case to court—before obtaining any construction. One thing, we think, is plain to common sense. There would have been no civil rights marches at Easter time in 1963. There might have been litigation, throughout whose pendency the unlimited breadth of Birmingham General City Code §1159 would have exercised its repressive and unconstitutional restraint. There might have been presentations by the Negro clergymen to the City Commission, and to the courts. But there would not have been on the streets of the city—the forum where, in fact, history shows the advocates of civil rights spoke effectively to the Nation during that Easter season—the freedom of peaceful speech, assembly and petition which the Constitution commands.

In short, it was not heedlessly, we suggest, that this Court in *Lovell,* in *Schneider, Largent* and *Jones,* in *Staub* v. *Baxley,* and in *Freedman* v. *Maryland,* announced the preference of the First Amendment for allowing challenges to the whole regime created by overbroad licensing laws such as §1159. Those decisions recognize that only by facilitating challenges to the laws themselves could their coercive sting be removed. By contrast, the decision below penalizes such challenges. It punishes the citizen who, by daring to assail an overbroad prior restraint, succeeds in having it limited to proper constitutional bounds. This punishment is the dues of that citizen although his challenge

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arrest may not have been improper, the total pattern of official action, as indicated by the public statements of city officials, was to maintain segregation and to suppress protests. The police followed that policy and they were usually supported by local prosecutors and courts."

is the only practicable and effective way to curb the repressive effects of the unconstitutional law. The First Amendment forbids any such punishment. Petitioner's conviction must therefore be reversed.

II.

Petitioner's Conviction Must Be Reversed Because It Imposes Criminal Liability Upon Him Without the Fair Notice Required by Due Process of Law.

A. Our principal submission under the Due Process Clause rests upon the two premises established at the outset of subsection I, *supra*: that, at the time petitioner participated in the Good Friday march in Birmingham in 1963, (i) Birmingham General City Code §1159, as written and in force, was plainly unconstitutional under innumerable, settled, squarely controlling decisions of this Court (pp. 26-27, *supra*), and (ii) equally settled, squarely controlling decisions of this Court established petitioner's right to ignore such an unconstitutional ordinance, and to conduct a peaceful public protest demonstration, not otherwise unlawful, without applying for a permit under §1159 (pp. 28-29, *supra*).

If these two propositions are sound, petitioner acted squarely within the letter and the spirit of a constitutional immunity extended to him by the decisions of the Supreme Court of the United States:

> We fail to see how, under these circumstances, a legal system which has always been supposed to require fair notice of potential criminal liability as a rudimentary demand of due process, see, e.g., *Lanzetta* v. *New Jersey*, 306

U. S. 451 (1939); *Bouie* v. *City of Columbia,* 378 U. S. 347 (1964), can countenance petitioner's criminal conviction. If an individual who acts entirely within the unmistakable scope of protection of a constitutional immunity expressly and previously declared by the highest judicial tribunal of the land can retroactively be held criminally accountable for that action, notions of notice are meaningless. The Constitution itself, and the judicial process created to enforce its guarantees, become simply "the most indefensible sort of entrapment." *Raley* v. *Ohio,* 360 U. S. 423, 438 (1959); *Cox* v. *Louisiana,* 379 U. S. 559, 571 (1965). The bitter irony of any such result is highlighted by the recognition which this Court has lately shown for reliance upon the Court's decisions by public authorities who act—as it later is held—unconstitutionally. *Linkletter* v. *Walker,* 381 U. S. 618 (1965); *Johnson* v. *New Jersey,* 384 U. S. 719 (1966). We would suppose that the citizen who claims a constitutional immunity has at least the same entitlement to stand upon this Court's squarely controlling constructions of the Bill of Rights as do public officials who jeopardize those rights. Indeed, the Court has so held in another context. *O'Connor* v. *Ohio,* 385 U. S. 92 (1966).

But we need not reach for analogies, since the point is plain. Criminal punishment for conduct expressly validated by long-settled and oft-repeated decisions of the highest court of the Nation would affront the fundamental conception of *mens rea* that lies at the root of our criminal law. Cf. *James* v. *United States,* 366 U. S. 213 (1961). We submit that, for the same plain reasons, it violates the fair notice requirement of the Due Process Clause.

B. The want of fair notice in this case is compounded by an additional consideration. Although the protective

application of the Constitution to petitioner's conduct at the time he acted was plain enough, the prohibitory application of §1159 was not. Petitioner stands convicted for taking part in an orderly march of 52 persons on the sidewalks of Birmingham. He has uniformly taken the position that this was nothing like the sort of "parade or procession or other public demonstration on the streets or other public ways of the city," for which §1159 requires a permit. The Office of the City Clerk apparently agrees, for the clerk's testimony makes clear that licenses were not issued for groups proceeding on the sidewalks (p. 9, *supra*). The Court of Appeals of Alabama also agreed, holding that the Good Friday march was not "a procession which would require, under the terms of §1159, the getting of a permit" (A. 139). But the Supreme Court of Alabama—which adopted the canon of narrow construction of laws that may infringe upon First Amendment rights, to the extent of narrowing the licensing standards of §1159 in a manner designed to avert impending constitutional invalidation of the ordinance—flouted that same canon in regard to the question of §1159's coverage.

The sum of the matter is that the Good Friday march in 1963 was dubiously within the scope of §1159 and plainly constitutionally protected. It was inconceivable that any court could give the applicable permit ordinance, §1159, a construction narrow enough to save that section constitutionally; and it would have bordered on perversity to suppose that a court so minded to narrow the ordinance would simultaneously expand its scope to reach small sidewalk marches that did not disturb or interrupt pedestrian or vehicular use of the thoroughfares. Nevertheless, both of

these implausible events followed in the wake of petitioner's arrest and prosecution. We submit that their concurrence can hardly be squared with due process of law.

III.

Petitioner's Conviction Must Be Reversed Because §1159, as Construed by the Supreme Court of Alabama, Remains Unconstitutional for Want of Procedural Safeguards Adequate to Assure Against Censorial Abuse of the Licensing Scheme.

The grounds asserted for reversal in parts I and II *supra* turn on the character of §1159 as it was written and in force prior to the restrictive construction of it by the Alabama Supreme Court on the appeal from petitioner's conviction. Neither submission, therefore, requires that this Court decide the question whether §1159, as reformed by the Supreme Court of Alabama, is constitutionally valid. If that question were reached, however, we would submit that the ordinance, even as restrictively interpreted, is unconstitutional by force of the First and Fourteenth Amendments; and that for this additional reason petitioner's conviction must be reversed.

"Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity. . . . We have tolerated such a system only where it operated under judicial superintendence and assured an almost immediate judicial determination of the validity of the restraint." *Bantam Books, Inc.* v. *Sullivan*, 372 U. S. 58, 70 (1963). Recent decisions by this Court have given practical significance to that paramount First

Amendment principle. *Freedman* v. *Maryland,* 380 U. S. 51 (1965), and *Teitel Film Corp.* v. *Cusack,* 390 U. S. 139 (1968), hold that a scheme of prior licensing of First Amendment activity "avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system." 380 U. S. at 58; 390 U. S. at 141. The nature of the requisite safeguards is described in the *Freedman* opinion. They may be summarized by the statement that both the administrative and judicial proceedings provided by law must be such as clearly to assure prompt and effective judicial review of a permit denial. See 380 U. S. at 58-60.

Plainly, the licensing scheme of §1159 does not meet these standards.

The ordinance itself, pp. 4-5 *supra,* contains no procedural provisions of any sort (except that both permit applications and permits must be "written"). No regular administrative procedures are shown on this record to be followed by the City Commission in its enforcement of §1159, except that the Office of the City Clerk keeps a book containing carbon copies of issued permits. The clerk testified below that no record of permit applications or denials is kept (A. 32-33). Section 1159 is also entirely silent on the question of judicial review of administrative action.

In its construction of the ordinance, the Alabama Supreme Court is almost equally silent on the question of procedures. The only discussion we are able to find in that court's opinion of the proceedings—administrative *or* judicial—which are envisaged by the licensing scheme of §1159 consists of a single sentence in a quotation from

administrative review proceeding;[16] and Ala. Code Ann., tit. 7, §248 (Recomp. vol. 1960), allowing a defendant 30 days to plead, answer or demur, appears applicable. The scope of review in mandamus is stated in *Lassiter* v. *Werneth,* 275 Ala. 555, 156 So. 2d 647, 648 (1963):

> "To warrant the issuance of mandamus, not only must there be a legal right in the relator, but, owing to the extraordinary and drastic character of mandamus and the caution exercised by courts in awarding it, it is also important that the right sought to be enforced be clear and certain, so as not to admit of any reasonable controversy. The writ does not issue in cases where the right in question is doubtful. . . ."

See also *Shirey* v. *City Board of Education,* 266 Ala. 185, 94 So. 2d 758, 761-762 (1957). This narrow scope of review was applied in a licensing case in *State ex rel. Ducourneau* v. *Langan,* 149 Ala. 647, 43 So. 187 (1907).[17]

We submit that, for several reasons, the licensing scheme approved by the court below, as set forth by the terms of §1159, by the Alabama Supreme Court's opinion construing that section, and by the general Alabama law ap-

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[16] Alabama Supreme Court Rule 47, cited in respondent's Brief in Opposition to Petition for Writ of Certiorari, pp. 23-24, n. 10, applies only to proceedings in the Supreme Court of Alabama on review of the judgment of the Circuit Court. It does not restrict the time within which the Circuit Court must rule on the matter, nor shorten the course of ordinary proceedings in the Circuit Court.

[17] We cannot purport to know, of course, whether the ordinary mandamus jurisprudence of Alabama would be applied in §1159 cases. The State appears to have had little experience in judicial review of administrative proceedings by any form of judicial process. But, if some streamlined and new-fashioned sort of judicial review proceedings are envisaged for enforcement of §1159, the Supreme Court of Alabama has failed to say so.

plicable to administration of the ordinance, fails the constitutional requirements of *Freedman* and *Teitel Film* by a wide margin.

In the first place, no regularity of administrative procedure in the processing of license applications is provided for or assured. The administrative decision to grant or deny a permit is not required to be made on a record, or by any standardized form of proceeding conducive to administrative fairness or judicial review. No reasons for the denial of a permit are required to be stated. It is not even required that an administrative recording be made and kept of permit applications and denials. Under these circumstances, the citizen who seeks to challenge the Birmingham City Commission's denial to him of a permit is impossibly handicapped. He cannot, without independent investigation demanding the expenditure of considerable resources, determine and judicially prove that the promise of the Alabama Supreme Court in its construction of §1159—"A systematic, consistent and just order of treatment with reference to the convenience of public use of the streets and sidewalks" (A. 170-171)—is being observed by the Commission. Arbitrary and discriminatory enforcement remains invisible, virtually impossible to prove.

The difficulty is exemplified by this case. Judge Cates, for the majority of the Court of Appeals, took judicial notice of the records of prior §1159 cases in that court and found a pattern of discriminatory application in violation of *Yick Wo* v. *Hopkins,* 118 U. S. 356 (1886). The Alabama Supreme Court appears to have held that such notice was improper, and the claim of discrimination not factually sustainable. However valid the latter view as a matter of Alabama appellate practice, it highlights the

impracticability of a system of judicial review of administrative decision-making which sits atop an administrative process—like that for enforcement of §1159—which is totally devoid of regular and visible procedures.

Second, no time limits are prescribed within which administrative action on a permit application under §1159 must be had. The ordinance itself makes no reference to time, and does not even require that the application specify a date certain on which the parade, procession or demonstration is to be held—although the *purpose* of the demonstration is required to be stated. It apparently is not envisaged that the Birmingham City Commission is to be held to any particular period—let alone to any particular short period—in its consideration of permit applications.

Third, when judicial review of a permit denial is sought, there is again no fixed, brief period of limitation for either the pleading or the hearing or the decision phases of the review proceeding in the Circuit Court. If the general pleading rules apply, they allow the Commission 30 days to reply to the mandamus petition of the aggrieved license applicant; if those rules do not apply, there is no stated time limitation. Hearing may be set by the Circuit Court, and its decision rendered, at the court's discretion.

Finally, the scope of judicial review of an administrative permit denial is exceedingly narrow. The test is abuse of discretion, and abuse must be clearly shown. Thus, the difficulties which inhere in demonstrating that an administrator has acted wrongly in regard to a decision made without a record, without a statement of reasons, and without even a regular bookkeeping system in which is recorded the history of administrative action in previous like cases, is exacerbated.

In its totality, this licensing scheme is procedurally deficient, and unconstitutional under the First Amendment. While the Alabama Supreme Court has, with considerable effort, supplied verbal standards for the administration of §1159 which appear consistent with the standards articulated by this Court in *Cox*, it has failed to prescribe or require "procedural safeguards," *Teitel Film Corp.* v. *Cusack, supra,* 390 U. S. at 141, adequate to make the constitutionalizing standards more than verbal. For this reason, §1159 is void, and petitioner's conviction under it must be reversed.

CONCLUSION

Petitioner's conviction must be reversed.

Respectfully submitted,

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